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In this respect the decree of the Appellate Court is defective, and we think the proper course would have been to give the plaintiff time before passing orders on the execution petition to apply to the District Court to amend the decree in accordance with the statutory directions contained in section 92 of Act IV of 1882. Taking this view, we set aside the orders that have been passed and remand the application for execution to the Court of first instance, in order that the District Munsif may act in accordance with these directions.

The question not being without difficulty, we shall make no order as to costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Handley.

SAMAYYA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

NAGALINGAM AND OTHERS (DEFENDANTS AND FOURTH DEFENDANT'S REPRESENTATIVES), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, ss. 67, 68—Usufructuary mortgage—Dispossession of mortgagee—Suit for sale—Costs.

The plaintiff, at the request of the mortgagors, paid off part of the debt due on a usufructuary mortgage to one of two mortgagees thereunder, and was placed by the mortgagors in possession under a usufructuary mortgage of that part of the mortgage premises which has been in the enjoyment of the mortgagee so paid off, who executed a release.

The other mortgagee under the first mortgage obtained a decree for sale on the footing of that instrument, and the mortgage premises were sold "subject to the establishment" of the plaintiff's claim: the decree-holder purchased and afterwards assigned his rights to two of the present defendants who dispossessed the plaintiff. The plaintiff now sued the mortgagors and mortgagees and the defendants above referred to:

Held, the plaintiff was not entitled to a decree for sale.

Semble: the plaintiff might have sued to have the sale, which had taken place at the suit of the first usufructuary mortgagee, declared to be invalid against him.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 299 of 1889 modifying the

* Second Appeal No. 418 of 1890.

decree of V. Suryanarayana, District Munsif of Guntur, in original suit No. 462 of 1888.

SAMAYYA
" "
NAGALINGAM.

Suit on a usufructuary mortgage, dated 18th May 1885, and executed in favor of plaintiff No. 1 (the father of plaintiff No. 2) by defendant No. 5 and his sons defendants Nos. 6 to 8. The principal sum secured by the mortgage was Rs. 225. The mortgage instrument, after reciting the debt and describing the mortgage premises, proceeded as follows :—

“ We have delivered to your possession the two plots within
“ these boundaries, assessed at Rs. 10 and measuring acres 1-61
“ of seri wet land, for five years from the year Parthiva to the
“ end of the year Virodhi. You shall, therefore, cultivate the said
“ land as you like and be enjoying the produce thereof in lieu of
“ the interest on the above sum. We shall ourselves be paying
“ the water-cess and other sist payable for that land every year.
“ We shall pay you the said principal of Rs. 225 from the other
“ properties we possess within five years. If we fail to pay
“ the Sircar sist in any year, you shall regard this very bond as a
“ sale-deed for this land in consideration of the said amount of
“ principal and take possession of it. If we fail to pay you the
“ amount of principal within the 15th Palguna Suddha of the
“ said Virodhi year, you shall regard this very bond as a sale-
“ deed and take possession of the land. If we pay you the
“ amount of principal before the 15th Chaitra Suddha of any year
“ within the said five years, you shall put us in possession of our
“ land. Usufructuary mortgage bond executed to this effect
“ with our consent. Dated as above.”

The mortgage premises comprised in the above mortgage were referred to in the suit as plots B and E. These plots, together with other pieces of land referred to as plots A, C, D and F, were comprised in a usufructuary mortgage, dated 27th May 1879, and executed by defendants Nos. 5 and 6 in favor of the father of defendant No. 3, one Betra Pantulu and defendant No. 4. It was now alleged in the plaint that these three mortgagees originally held the lands in separate enjoyment, defendant No. 4 holding plots B and E ; and that subsequently, viz., on 21st April 1885, Betra Pantulu transferred his interest in the mortgage to defendant No. 3 (a minor), who thereupon, his father having died, became the holder of plots A, C, D and F. It appeared that plaintiff No. 1 paid off defendant No. 4 at the

SAMAYYA
v.
NAGALINGAM.

request of the mortgagors, who, having obtained a release from defendant No. 4, executed the mortgage now in suit on 18th May 1885 and placed plaintiff No. 1 in possession of plots B. and E.

In 1886 defendant No. 3 by his mother and next friend obtained a decree against defendant No. 4 and the mortgagors for the balance of the money due under the mortgage of 27th May 1879 and for the sale of the mortgage premises. He accordingly brought the six plots of land to sale in execution, but the plaintiffs intervened and the land was sold "subject to the establishment" of the plaintiffs' claim to plots B and E. The decree-holder became the purchaser at the Court sale; and subsequently sold the land to defendants Nos. 1 and 2. These vendees then dispossessed the plaintiffs, who accordingly sued as above for the sum due on the mortgage of 18th May 1885 and for sale of the mortgage premises. Defendant No. 3 was joined as defendant by his mother and guardian.

The District Munsif passed a decree as prayed. On appeal the District Judge ruled that the plaintiffs in a suit on a usufructuary mortgage were not entitled to a decree for sale; but, observing that it was not disputed that the mortgage debt was a family debt, he proceeded to hold:—"Plaintiffs may have a decree for the mortgage money against defendants Nos. 5, 6 and 7 and against the share in the family property of defendant No. 8, who is a minor, with interest at 6 per cent. per annum from date of plaint to date of payment. The judgment of the lower Court is modified accordingly. As this litigation has been caused by the erroneous action of defendant No. 3, he will bear all the costs throughout of all the parties."

The plaintiffs preferred this second appeal on the following grounds:—

- "The plaintiffs are under the circumstance entitled to obtain
- "a decree for sale of the properties B and E and the
- "declaration prayed for in the plaint.
- "The plaintiffs virtually stand in the position of defendant
- "No. 4, and are entitled to all the rights which the said
- "defendant had under his mortgage.
- "The original mortgage was split up by the mortgagees them-
- "selves, and defendant No. 3 had by his conduct aban-
- "doned his rights over plots B and E. The said defendant
- "and those who claim through him are now estopped

“ from contending that the plots B and E continued to be
 “ liable to the claims of the other two mortgagees. SAMAYYA
 “ A suit for sale is maintainable under the terms of the v.
 “ contract. NAGALINGAM.
 “ If the sale to defendant No. 3 under the decree is invalid,
 “ defendants Nos. 1 and 2 have no right to deprive the
 “ plaintiffs of their possession, and the plaintiffs are at
 “ any rate entitled to the declaration asked for and
 “ possession.
 “ Even if the plaintiffs are mere puisne-mortgagees, they may
 “ be permitted to redeem the prior mortgage if it was
 “ really subsisting in respect of plots B and E.”

S. *Subramanya Ayyar* and P. *Subramanya Ayyar* for appellants.

Anandachari for respondents.

JUDGMENT.—It is not clear what the lower Courts intended to find to have been the effect of the division between the three original usufructuary mortgagees, the third defendant's father, defendant No. 4 and Betra Pantulu. The Munsif in paragraph 14 of his judgment finds that there was an agreement that each mortgagee should discharge his debt from the usufruct of the plots that went to his share, and that an agreement must be inferred that one should have no further claim on the plots that went to the other. If this were the effect of the division, then the plots B and E were only subject to the fourth defendant's share of the mortgage debt, which was extinguished by his release, and therefore they came into the first plaintiff's hands upon the occasion of the usufructuary mortgage to him free from any claim under the original mortgage and could not be sold in execution of the third defendant's decree upon that mortgage. But the above finding of the Munsif is inconsistent with another part of his judgment, paragraph 20, where he holds that every part and parcel of the mortgaged property is liable to every pie of the debt, which again appears to be inconsistent with the last part of the same paragraph. The District Judge appears to agree with the Munsif as to the fact of the division, but has not found distinctly as to its effect. But we think it is not necessary to call for a finding on this question, as the case can be disposed of on the facts as found. We agree with the District Judge that as usufructuary mortgagees the plaintiffs cannot sue for sale of the

SAMAYYA
v.
NAGALINGAM.

mortgaged property. It is argued for the appellants that the circumstances mentioned in section 68 of the Transfer of Property Act having occurred, that section gives them the right to sue for the mortgage debt, and therefore, by implication a right to sue to enforce the debt by sale of the mortgaged property. We cannot concur in this reasoning, assuming the circumstances contemplated by section 68 exist in this case.

Sections 67 and 68 deal with three kinds of rights of mortgagees, viz., foreclosure, sale and suit for the money due, section 67 being concerned with the two first and section 68 with the last. Section 68 declares the right of the mortgagee to sue for the mortgage money in certain cases, but it does not affect the provisions of section 67 as to his right to foreclosure or sale, and that section expressly denies to a usufructuary mortgagee the right to sue for foreclosure or sale. It is true third defendant was also only a usufructuary mortgagee and therefore had no right to sue for sale of the mortgaged property, and the decree for sale and the sale under it might have been set aside as regards plots B and E at the instance of plaintiffs who were no parties to that suit. Plaintiffs might, therefore, have sued to have the sale declared invalid as against them and as a necessary consequence to be put in possession of the plots B and E, of which they have been illegally dispossessed. This, however, is not the suit plaintiffs have brought, and we do not think the present suit can be allowed to be converted into one of that nature. They have mistaken their remedy and must be content with the decree for the money which they have obtained and against which there is no appeal.

It is unnecessary to decide whether the District Judge was right in holding that the circumstances contemplated by section 68 of the Transfer of Property Act as entitling a mortgagee to sue for the mortgage money exist in this case, as there is no appeal against that part of the decree. The appeal fails and is dismissed but without costs, as the conduct of third defendant's guardian in bringing the property to sale and of first and second defendants in dispossessing plaintiffs was illegal.

On behalf of third defendant, a minor, a memorandum of objections is presented by his guardian objecting to that part of the decree of the Lower Appellate Court which makes him liable for all the costs of all parties throughout. This is clearly wrong.

The minor cannot be made personally responsible for the act or defaults of his guardian or of the first and second defendants.

SAMAYYA
v.
NAGALINGAM.

We think the proper decree as to costs is that all parties do bear their own costs throughout. We shall modify the decree of the Lower Appellate Court accordingly. We make no order as to costs of the memorandum of objections.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

OAKSHOTT AND OTHERS (PLAINTIFFS),

v.

THE BRITISH INDIA STEAM NAVIGATION COMPANY
(LIMITED), (DEFENDANTS.) *

1891.
Dec. 4, 8.

Presidency Small Cause Courts Act—Act XV of 1882, ss. 37, 69—Application to Full Bench for retrial—Case stated.

The full bench of a Presidency Court of Small Causes cannot state a case for the opinion of the High Court on an application for a new trial made under Act XV of 1882, s. 37.

CASE stated under section 69 of Act XV of 1882 and section 617 of the Civil Procedure Code by the Judges of the Court of Small Causes, Madras, in small cause suit No. 22581 of 1890 on their file.

The *Acting Advocate-General* (Hon. Mr. Wedderburn) for plaintiffs.

Mr. K. Brown for defendants.

JUDGMENT.—The first question referred to us by the full bench of the Small Cause Court is whether a hearing of an application for a new trial by a full bench under section 37 of the Presidency Small Cause Act XV of 1882 can be said to be the hearing of a suit within the meaning of section 69 of the said Act, so as to entitle the Court to state a case for the opinion of the High Court either on its own motion or at the requisition of either party.

Section 69 of the Presidency Small Cause Act provides for a reference to the High Court in two cases (1) when two or more

* Referred Case No. 32 of 1891.